THE MANIPULATION OF CONSCIOUSNESS: A FIRST AMENDMENT CRITIQUE OF SCHOOLING†

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I. INTRODUCTION

Schooling is everywhere and inevitably a manipulator of consciousness, an inculcator of values in young minds. This article addresses the school's imposition of values and the school's relation to the first amendment's guarantee of freedom of expression. Some of the practical implications of the first amendment critique of schooling are discussed. The emphasis, however, is upon examining the ways in which first amendment rights are threatened by the structure and ideology of American schooling, not upon the evaluation of particular strategies for change.[1]

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[1] Throughout this Article we speak of imposition of values by the government or state because the government is the vehicle through which political power has traditionally been exercised. We do not discuss the imposition of the same beliefs by corporations or private school proprietors, who are not normally considered agents of the government. We further limit our discussion of government regulation or inculcation of values to the school setting. In the final analysis, the presence of government intervention, or "state action," is determined by the Court's willingness to extend the protection of the Constitution to a particular activity. State action is a flexible doctrine that has expanded and contracted with the Court's predilection for protecting civil liberties. *Cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1173–74 (1978) (determination of whether there is state action involves consideration of the reach of particular constitutional provisions). We have not directly addressed the propriety of holding

In Part II of this Article, we reevaluate the nature of first amendment protections, applying one of the amendment's central themes to the structure of contemporary education. In Part III we detail some of the conflicts between this view of the first amendment and the present educational system. In Part IV we examine racism as a constitutional and practical problem, given an interpretation of the first amendment as calling for both greater family liberty in choosing schools and greater family control of value inculcation within schools.

The problem of racism commands our attention 1) because disproportionate percentages of the poor and working class are the victims of consciousness manipulation in government schools, and racial minorities are overrepresented in the poor and working class; 2) because a clear implication of our argument about the school's infringement of first amendment rights is that equal choice in schooling must be provided for all families, but "family choice" has historically been a code word for the preservation of racially segregated and stigmatizing schools; and 3) because racism has been the most persistent and pernicious flaw in American schooling.

We deal throughout with problems that have traditionally been understood as questions of equality in the social order or of due process of law. We do not dispute these traditional understandings, but we try to refocus the problems in terms of their relationship to the first amendment, whose explicit enumeration of the freedoms of religion, speech, press, assembly and petition establishes the foundation of the freedom of expression. The operation of a system of free expression is central to the constitutional order and indeed to our humanity, for, as Paulo Freire recognizes, dialogue among men is essential to their liberation from oppression: "men . . . cannot be truly human apart from communication, for they are essentially communicative creatures. To impede communication is to reduce men to the status of 'things' . . . ."[2]

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the body politic accountable for the actions of other powerful organizations that it allows to stand in its place. However, our argument for an expanded interpretation of the substance of the first amendment suggests the need for a view of state action that is able to accommodate that interpretation.

[2] P. FREIRE, PEDAGOGY OF THE OPPRESSED (1968, 1970 trans.). *See especially id.* at 57–74.

II. FIRST AMENDMENT PROTECTION OF THE FORMATION OF BELIEFS

A. The Traditional First Amendment Conception

This section will outline the relation of first amendment protections to the problem of manipulation of belief and opinion by schools.[3] In this context we view the first amendment not only as a collection of interconnected personal rights but as the linchpin of a system of free expression[4] and open political decisionmaking.

The need to examine and further develop a theoretical understanding of the first amendment is accentuated by the problem of applying the amendment to social institutions that neither existed nor were contemplated at the time the Bill of Rights was enacted. Among all the institutions that have arisen since the end of the eighteenth century, perhaps the most complex and problematical one for first amendment analysis is universal and compulsory schooling.

It has been observed that the various first amendment rights are reflections of a single intent and understanding on the part of the framers of the Constitution.[5] Expressed in terms of the traditional understanding of politics and personality, this conception treated the individual as the central unit of political and social being, free to develop in his own way, to express himself and to engage in the

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[3] A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); POLITICAL FREEDOM (1960); *The First Amendment is an Absolute,* 1961 SUP. CT. REV. 245; *What Does the First Amendment Mean?* 20 U. CHI. L. REV. 461 (1953). *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1 (1965); *cf.* Comment, *By Any Other Name: Meiklejohn, The First Amendment and School Desegregation,* 3 CONN. L. REV. 299 (1971).

[4] *See* Brennan *supra* note 3. A major work that explores first amendment theory is T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966). *See also* N. DORSEN, P. BENDER, B. NEWBORNE & S. LAW, EMERSON, HABER, AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (4th ed. 1979).

[5] Meiklejohn, *What Does the First Amendment Mean?, supra* note 3, at 463:

> Apparently all they could make their words do was to link together five separate demands which had been sharpened by ages of conflict and were being popularly urged in the name of the "Freedom of the People." And yet, those demands were, and were felt to be, varied forms of a single demand.

struggle to mold social institutions and public policy without government interference.[6] The first amendment is thus a statement of the dignity and worth of every individual, of the value of a "single human soul,"[7] of the fact that the government exists for the benefit of the people and not the people for the benefit of the government.

The particular freedoms of press, speech and assembly are part of the system that guarantees individual and group expression and insures that opinions and beliefs are freely given and exchanged in a marketplace of ideas.[8] Self-expression, which is an end in itself, and the fair and reliable making of public policy are thus both served by the specific first amendment protections.

B. Belief Expression and Belief Formation

To implement this conception of the first amendment in the world of universal, institutionalized education requires a broadening of the amendment's traditional protection of *expression* of belief and opinion to embrace *formation* of belief and opinion. As will be seen in applying first amendment principles to institutionalized education, expression and formation are not as separate in human interaction as they have been analytically.

Free expression makes unfettered formulation of beliefs and opinions possible. In turn, free formulation of beliefs and opinions is a necessary precursor to freedom of expression. If the government were to regulate the development of ideas and opinions through, for example, a single television monopoly or through religious rituals for children, freedom of expression would become a meaningless right. The more the government regulates formation of beliefs so as to interfere with personal consciousness, the fewer people can conceive dissenting ideas or perceive contradictions between self-interest and government-sustained ideological orthodoxy. If freedom of expression protected only communication of ideas, totalitarianism and freedom of expression could be characteristics of the same society.

Connecting the theme of the dignity of the individual with an

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[6] Meiklejohn, *The First Amendment is an Absolute, supra* note 3, at 254–56.

[7] Gillette v. United States, 401 U.S. 437, 469 (1971) (Douglas, J., dissenting).

[8] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

understanding of how personal development may be influenced by a pervasive, child-rearing institution such as a school suggests a new formulation of first amendment principles: the development as well as the expression of those beliefs, opinions, world views and aspects of conscience that constitute individual consciousness should be free of government manipulation. The notion of manipulation here refers not to the effectiveness of any particular technique of value inculcation, but to government control over what values are taught. The individual ought to control his own education, or, where the individual is too young to make an informed and voluntary choice, his parents ought to control it. This formulation of the modern meaning of the first amendment suggests that individual human consciousness should be protected from coercion by the state, whether that coercion takes the form of religious indoctrination,[9] the involuntary administering of psychoactive drugs,[10] the elimination of nonpublic schooling[11] or a government monopoly of television broadcasting. Today, the opportunity to manipulate consciousness precedes and may do away with the need to manipulate expression.

Dispensing with individual consent or sacrificing individual control to government-sponsored manipulations of consciousness renders individual expression a sham. But more important to the first amendment's position as the linchpin of constitutional democracy is the effect that consciousness manipulation has upon the political process and the political sovereignty of the individual.

Alexander Meiklejohn has articulated a useful understanding of individual consciousness and the first amendment by focusing on the realm of political action.[12] According to Meiklejohn, the first amend-

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[9] Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

[10] Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979). In ruling that a mental patient is entitled to refuse treatment in nonemergency situations, Judge Tauro relied not only upon the patient's right to privacy, but upon his first amendment rights: "The First Amendment protects the communication of ideas. That protected right of communication presupposes a capacity to produce ideas. As a practical matter, therefore, the power to produce ideas is fundamental to our cherished right to communicate and is entitled to comparable constitutional protection." *Id.* at 1367.

[11] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[12] Meiklejohn, *The First Amendment is an Absolute, supra* note 3, at 255–56. Meiklejohn emphasizes the importance to the political process of protecting the formation of beliefs in modern society. However, individual development and expression should be protected for their own sake as well.

ment is meant as an absolute protection for individuals in exercising their electoral power, not simply in voting, but in all those activities of thought, communication and belief formation that inform the electoral power[13] or are part of the right of self-government guaranteed by the Constitution. Any exercise of the freedom of speech, press, assembly or petition is protected from any government abridgment "whenever those activities are utilized for the governing of the nation."[14] Meiklejohn's enumeration of the freedoms necessarily related to the informed exercise of electoral power under the first amendment is expansive, including public discussion of public issues, together with the dissemination of information and opinion, literature and the arts, the achievements of philosophy and the sciences in creating knowledge and understanding, and education in all its phases.[15] Any activity is protected if it can reasonably be described as related to the kinds of thought or expression which ultimately are part of the governing role of citizens.[16]

According to Meiklejohn's theory, although some regulation of communication may be permitted under the amendment (chiefly regulation of the incidents of speaking or other freedoms, not their content), no regulation of belief can be tolerated:

> A citizen may be told when and where and in what manner he may or may not speak, write, assemble, and so on. On the other hand, he may not be told what he shall or shall not believe. In that realm, each citizen is sovereign. He exercises powers that the body politic reserves for its own members.[17]

The logic of Meiklejohn's formulation suggests that the society that can utilize institutional power to reduce an individual's control over the development of personal consciousness has made that indi-

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[13] *Id.* at 254.

[14] *Id.* at 256.

[15] *Id.*

[16] *Id.* at 257.

[17] *Id.* at 257–58. *But see* A. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 3, at 79–82 (arguing that the first amendment protects only speech directed towards debating the common good; speech directed towards private interests is entitled only to due process protection).

vidual politically impotent. Under these conditions the government becomes a kind of political perpetual motion machine, legitimizing its policies through the public opinion it creates. The protection of the governing powers of the individual through the first amendment is a necessary part of a system that relies upon the just consent of the governed. Every citizen must participate in making these decisions, not out of loyalty to some idealized notion of democracy, but out of a sense of self-preservation. The right to vote, the freedoms of expression and belief enumerated in the first amendment, the legitimate formation of political majorities and public policy all are knit together in making the dignity and political powers of the individual meaningful.

Those who are prevented from making themselves heard or whose participation in public affairs is restricted by government intervention are not only stunted in personal development and human interaction, but also become the victims of others who are better able to understand and express their own interests or their personal versions of the general welfare. Although an understanding of the first amendment begins with a recognition of the specific freedoms of expression, it ultimately involves the capacity to be human and the ability to participate in political action, to acquire and produce knowledge and to transform such knowledge into power that affects the conditions of daily life.

C. Schooling and Belief Formation

There is a reciprocal relationship between schooling and this modernized view of the first amendment. The application of the amendment to schooling suggests ways of rethinking the amendment's meaning; the revised understandings of the amendment shed new light on the function and effect of American education.

It is commonplace to recognize that schools, as institutions occupying a substantial portion of a child's waking life, ought to respect the first amendment rights of students. While the law has recognized that teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[18] most cases

[18] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969).

have dealt with the right of the individual to be free of specifically imposed restrictions of expression.[19] It is also commonplace to hear that by teaching basic skills of communication as well as knowledge and patterns of thought, schools are preparing children to exercise those political freedoms that are at the core of democratic activity.[20] What remains largely unconfronted is the pervasiveness of value transmission in the schools. In practice, the choice of values to be transmitted lies not with the child or the child's family,[21] but with the political majority or interest group in charge of the school system.[22] The specific restrictions on freedom of press or speech imposed by school authorities are more properly recognized as the most obvious and superficial examples of restrictions on first amendment rights imbedded in schooling. Even when a school bends over backwards (as it almost never does) to provide all points of view about ideas and issues in the classroom, it barely scratches the surface of its system of value

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[19] *See, e.g.*, Healy v. James, 408 U.S. 169 (1972); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Pickering v. Board of Educ., 391 U.S. 563 (1968).

[20] "The classroom is peculiarly the marketplace of ideas. The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues . . . ." Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), *citing* United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

[21] This Article does not attempt to resolve the difficult issue of whose choice of school should prevail, the child's or the parents'. *See* Wisconsin v. Yoder, 406 U.S. 205, 241–46 (Douglas, J., dissenting in part) (Court should consider views of Amish children in determining whether they are to receive a secular or religious education). Still, it is in the nature of childhood that some institution or person will have the primary influence over the formation of values held by the young. For purposes of this essay, *family choice* and *individual rights* are used interchangeably. This reflects the need to understand the coercion applied in schools, and leaves for another essay the generation of principles capable of resolving contests between the child and the family over value choice and schooling decisions.

[22] This problem was perceived more than 100 years ago by John Stuart Mill:

> [S]tate-sponsored education . . . is a mere contrivance for moulding people to be exactly like one another; and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind . . . .

J. MILL, ON LIBERTY 190–91 (1859).

inculcation.[23] A school must still confront its hidden curriculum—the role models teachers provide, the structure of classrooms and of teacher-student relationships, the way in which the school is governed, the ways in which the child's time is parceled out, learning subdivided and fragmented, attitudes and behaviors rewarded and punished. Even in those areas concerned with basic skills it is clear that teaching is never value-neutral, that texts, teachers, subject matter and atmosphere convey messages about approved and rewarded values and ideas.[24] It is unlikely that any amount of "equal time" for other points of view will reduce this effect.[25]

Most parents of children about to begin school want to know whether their children will be helped to learn to read or do mathematics or develop physical dexterity, but hardly anyone stops with these questions. Whatever their values, most parents seem to recognize that a good deal of child rearing will take place at school and that the school is a social environment from which a child may learn much more than the formal curriculum. Schooling alters the child's concept of reality and, therefore, his perception of and reaction to all things.

The Supreme Court has recognized that value inculcation is inherent in schooling. Thus far, however, the Court has found such value inculcation to be unconstitutional only in its more overt forms or when the values involved are religious.

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[23] The social science research examining value inculcation in schools includes the following: on sex-role stereotypes, Sarrio, Tittle & Jacklin, *Sex Role Stereotyping in the Public Schools*, 43 HARV. EDUC. REV. 386 (1973); on political ideology and cognitive structure, Lightfoot, *Politics and Reasoning: Through the Eyes of Teachers and Children*, 43 HARV. EDUC. REV. 197 (1973); on individualism, achievement and the categorization of persons, D. MCCLELLAND, THE ACHIEVING SOCIETY (1961), especially at 453–74, P. BREER & F. LOCKE, TASK EXPERIENCE AS A SOURCE OF ATTITUDES (1965), and Dreeben, *The Contribution of Schooling to the Learning of Norms*, 37 HARV. EDUC. REV. 211 (1967).

[24] Of course, value inculcation is an extremely complex phenomenon whose effectiveness cannot be measured simply by looking for children whose values match those of the school. Some children will react by swallowing whole the values that are put forth didactically or in the hidden curriculum. Others will only pretend to agree with the prevailing orthodoxy while suppressing internal tensions ranging from personal alienation to confusion and loss of identity. The variety of such reactions is explored in the setting of "total institutions" in Erving Goffman's ASYLUMS (1961).

[25] The validity of the widely accepted belief that the best way to educate young children is to place them in an educational and intellectual crossfire in order to give equal emphasis to differing values remains to be proven.

In the landmark cases of *Pierce v. Society of Sisters*[26] and *Meyer v. Nebraska*,[27] the Court placed limits on the power of the state to promote homogeneity in its schools.[28] In *Pierce*, the Court invalidated a state statute which required all students to attend public school. In striking the law down, the Court noted that "the child is not the mere creature of the state"[29] and ruled that the Constitution's "fundamental theory of liberty" "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[30] A central concern of the Court seems to have been preserving the right of families to direct the upbringing of their children without unreasonable interference from the political majority.[31] In *Meyer* the Court held unconstitutional a statute prohibiting the teaching of modern languages to young children, finding this an impermissible means of fostering "a homogeneous people with American ideals."[32]

In *West Virginia State Board of Education v. Barnette*,[33] the Court held invalid under the first amendment a statute which compelled public school students to salute the flag. Writing for the Court, Justice Jackson noted that the pledge was a form of utterence which required "affirmation of a belief and an attitude of mind."[34] He went on to point out that the case did not turn solely on the religion clauses of the first amendment but was based on the amendment's broader protection of nonconforming beliefs. In perhaps the Court's most absolute declaration of the freedom of individual consciousness, Jackson said, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be

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[26] 268 U.S. 510 (1925).

[27] 262 U.S. 390 (1923).

[28] While both cases were decided under the substantive due process doctrine that prevailed during the first part of this century, *see, e.g.*, Lochner v. New York, 198 U.S. 45 (1905), the values that the Court sought to protect are among those encompassed by the first amendment theory advanced here. *See* Arons, *Separation of School and State:* Pierce *Reconsidered*, 46 HARV. EDUC. REV. 76 (1976).

[29] 268 U.S. at 535.

[30] *Id.*

[31] *Id.* at 534–35.

[32] 262 U.S. at 402.

[33] 319 U.S. 624 (1943).

[34] *Id.* at 633.

orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . ."[35]

As we will argue in the third section of this Article, the current system of education forces students "to confess by word or act" in a variety of ways that have not been attacked by courts or legislatures. Nevertheless, *Barnette* remains a powerful formulation of the unconstitutionality of state-imposed orthodoxy and of the intimate relationship between holding and expressing beliefs.

In *Abington School District v. Schempp*[36] the Court recognized that attempts to inculcate value orthodoxy through Bible readings or the recitation of prayer were unconstitutional. The Court stressed the need for governmental neutrality with respect to all religious "orthodoxies"[37] and erected a wall to separate church and state in the area of school prayer. The Court tried to prevent religious factionalization of political institutions and to preserve the governmental neutrality toward religion that is part of first amendment doctrine.[38]

Although recognizing the danger of inculcation of religious values or establishment of religion in schools, the Court has failed to consider the first amendment implications involved when equally basic but nonreligious values form a part of the philosophy established by a school and communicated to its students.[39] Perhaps the case in which the law has most clearly ignored the similarities between religious and secular socialization is *Wisconsin v. Yoder*,[40] in which the Amish

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[35] *Id.* at 642. *See also* Wooley v. Maynard, 430 U.S. 705 (1977), in which the Supreme Court upheld a district court order enjoining the arrest or prosecution of two Jehovah's Witnesses for covering the "Live Free or Die" motto on their New Hampshire license plate. The Court vindicated the Maynards' claimed moral, religious and political objections in language applicable to many free speech claims: "The First Amendment protects the right of individuals to hold a point of view different from the majority and to *refuse to foster* . . . an idea they find morally objectionable." 430 U.S. at 715 (emphasis added). The Court then balanced the Maynards' free speech interests against the state's interest in displaying the motto and held that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to *avoid becoming the courier* for such message," 430 U.S. at 717 (emphasis added).

[36] 374 U.S. 203 (1963).

[37] *Id.* at 223.

[38] Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

[39] *See* United States v. Seeger, 380 U.S. 163 (1965).

[40] 406 U.S. 205 (1972).

community of Wisconsin was granted a constitutional exemption from compulsory high school attendance. The Court ruled that attendance at a high school would impose value conflicts and alienation which would destroy the Amish religious community and violate its first amendment right of free exercise of religion. In making its ruling, the Court enumerated Amish objections to high school socialization which, although religiously based for the Amish, are equally important to parents with no religious affiliation or background:

> The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing, a life of "goodness" rather than a life of intellect, wisdom rather than technical knowledge, community welfare rather than competition, and separation rather than integration with contemporary worldly society.[41]

The Court thus recognized that socialization is an integral part of schooling and at the same time limited the constitutional impact of that recognition to religious issues.[42]

D. The First Amendment and the Fourteenth Amendment: Twin Guardians of the Political Process

While value inculcation under the present structure of public education threatens the debate in the marketplace among ideas that the first amendment seeks to insure,[43] we must not overlook the fact that schools influence the quantity and quality of that debate both by transmitting values alien to those of many families and also by transmitting important skills and knowledge in an unequal manner. Not only are the

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[41] *Id.* at 211.

[42] Chief Justice Burger's majority opinion in *Yoder* limited the protection of the Constitution to those with religious rather than secular objections, 406 U.S. at 215–16, and implicitly to those whose religions were traditional, *id.* at 235–36. *See id.* at 246 (Douglas, J., dissenting in part) (criticizing the majority's emphasis on the "law and record" of the Amish).

[43] *See* text accompanying notes 18–25 *supra*.

values of the more powerful groups in our society imbedded in the official and invisible curricula of our public and private schools, but the children of the value imposers have greater access to the skills and information crucial to the effective articulation of their own interests. Segregation, suspensions and expulsions, standardized tests and tracking, and unequal resource allocation all operate to deprive some students (disproportionately minorities and the poor) of skills, information and attitudes that would enable them to speak and act more effectively.

Such problems have traditionally been thought to involve questions of equality rather than of free expression.[44] It is not suggested that they are problems which no longer require active redress under the equal protection clause; rather, it should be recognized that such practices conflict with both the first and the fourteenth amendments which stand as twin guardians of the democratic process. Just as one aim of the first amendment is to foster intelligent self-government,[45] the fourteenth amendment is directed in part at protecting the right to participate in the political process.[46] Because education is vital not only to

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[44] *See* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Sorgen, *Testing and Tracking in the Public Schools,* 24 HASTINGS L.J. 1129 (1973); Yodof, *Suspension and Expulsion of Black Students From the Public Schools: Academic Capital Punishment and the Constitution,* 39 LAW AND CONTEMP. PROB. 374, 379 (1975). For a discussion of the disparate impact of school disciplinary procedures on poor and minority children from the perspective of the due process and equal protection clauses, see Hawkins v. Coleman, 376 F. Supp. 1330 (N.D. Tex. 1978) and the cases and studies collected in note 71 *infra.*

[45] *See* Stromberg v. California, 283 U.S. 359, 369 (1931).

[46] Whitcomb v. Chavis, 403 U.S. 124 (1971); Williams v. Rhodes, 393 U.S. 23 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

In outlawing segregation of public facilities such as beaches and parks, the Supreme Court seems to have abandoned the rather meaningless distinction it made in Plessy v. Ferguson, 163 U.S. 537, 544, 551-52 (1896), between "social" and "political" equality. In Brown v. Board of Educ., 347 U.S. 485, 494 (1954), the Court quoted approvingly the district court's finding that "[a] sense of inferiority affects the motivation of a child to learn. Segregation . . . therefore, has a tendency to [retard] the educational and mental development of negro children . . . ." Although the Supreme Court's opinion in *Brown* dealt only with the inequality inherent in segregated schools, a subsequent series of per curiam decisions declaring the segregation of public facilities unconstitutional made it clear that the *Brown* holding extended to areas that

the effective exercise of the ballot but also to effective participation in the political process that precedes and follows an election,[47] the first and fourteenth amendments are both implicated by inequalities in the educational system.

As will be discussed in the third section, the constitutional problems raised by unequal access to educational opportunity are intertwined with those created by value inculcation. To the extent that schools provide minority and poor children with fewer skills and less information, such children will be relatively less able to hold their own in a political debate that involves the increasingly complex issues of our technocratic society. In addition to being well informed, effective participants in the political process must understand what is in their

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the *Plessy* Court's definition would have considered social. *See, e.g.*, State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (athletic contests); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (involving public golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches). By using per curiam decisions in these cases, the Court again avoided the opportunity to controvert the *Plessy* dicta distinguishing "social" from "political" equality. *See also* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Lawrence, *Segregation "Misunderstood": The* Milliken *Decision Revisited*, 12 U.S.F.L. REV. 15 (1977).

[47] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 113–14 (1973) (Marshall, J., dissenting):

> Of particular importance is the relationship between education and the political process. "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." *Abington School Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). Education serves the essential function of instilling in our young an understanding of and appreciation of the principles and operation of our governmental processes. Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation. A system of "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."

See also Serrano v. Priest, 5 Cal. 3d 584, 608, 487 P.2d 1241, 1258, 96 Cal. Reptr. 601, 618 (1971) ("At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.").

own self-interest. If schools expose children only to values and ideas that buttress the status quo and legitimize the position of those in power, it is unlikely that those who are presently oppressed will learn the cause of their oppression or the means of overcoming it.[48]

Similarly, effective political participation requires a positive self-identity, a sense of self-worth enabling one to believe that one deserves fair treatment and that one is capable of doing something about unfair treatment. If the values expressed in our schools convince minority children that they are worthless, then they are deprived of that quality most essential for political self-preservation: the desire to preserve themselves.

In *Brown v. Board of Education*,[49] the Supreme Court found that segregated schools stigmatized black children and that the resulting sense of inferiority made it more difficult for them to learn.[50] The Court held that this cause-and-effect relationship made segregated schools inherently unequal.[51] The same stigma operates to minimize the ability of black children to be effective self-interested participants in the political debate. Because the segregated individual is labeled as inferior to his fellow citizens, his thoughts and words are given less weight when political affairs are discussed. If he accepts the stigma he may mistrust his own ideas and perceptions and feel that his interests deserve less protection. The stigma of segregation restricts the ability of blacks to participate in the political process, and thus impairs their first as well as fourteenth amendment rights.

The refocusing of first amendment principles on formation of ideas rather than on communication, and on political power rather than on self-development should clarify rather than blur other formulations of the importance and meaning of the first amendment. But at the same time, a revised understanding of the first amendment raises new problems of interpretation and of conflict with other aspects of the Constitution. Attempting to apply a modernized understanding of the amendment to schooling creates an opportunity to explore some of these

[48] While children will doubtless learn a great deal in settings outside the school, the school system is the repository of the skills and accompanying credentials that are necessary for access to society's decisionmaking forums. *See* text accompanying notes 65–69 *infra*.

[49] 347 U.S. 485 (1954).

[50] *Id.* at 494.

[51] *Id.* at 495.

problems and test the usefulness of invoking the Constitution to protect individual consciousness. This application will also point the way to some new understandings of the nature of schooling and education policy.

III. APPLYING THE THEORY TO PRESENT REALITY: FORCEFUL DENIAL OF FIRST AMENDMENT LIBERTIES

Government-run schooling, universal, compulsory and publicly supported, has traditionally been viewed by most Americans as an essential democratic institution. According to this view, schooling teaches skills necessary to the exercise of the rights of citizenship, is required for survival in our economic system and inculcates in the rising generation those values and attitudes which support democratic institutions. In its more rapturous moments, the teaching profession and educators have claimed not only that schooling is the bulwark of democracy in America, but that the schools are the nation's primary agency for eliminating social ills, inoculating against anti-Americanism and perfecting the personal and national character.[52]

This equation of the American school system with social democracy and personal liberty, may be more self-serving than self-evident. In fact, American schooling may be structured in a way that undercuts the most basic freedoms of democracy. For at the heart of American school ideology is the belief that schooling decisions, like most governmental decisions, are the proper province of the political majority.

Majoritarian control over the basic cultural and political values institutionalized in public schools is tolerable to some parents only because they are constitutionally guaranteed the right to choose a non-public school for their children.[53] It is made tolerable to others because they can afford to move their homes to those school districts in which they feel their aspirations, beliefs and life-styles are reflected in the schools their children attend. These escape hatches exist for very few,

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[52] A historical review of the ideology supporting compulsory schooling may be found in Everhart, *Compulsory School Attendance Laws,* 47 REV. OF EDUC. RESEARCH 499 (1977). *See also* M. KATZ, IRONY OF EARLY SCHOOL REFORM (1968); D. NASAW, SCHOOLED TO ORDER (1979); D. TYACK, THE ONE BEST SYSTEM (1974).

[53] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

and the poor and working class are saddled with schooling decisions that they do not control and do not like.[54] It is significant that in this situation so few people have expressed the belief that school decisions are so personal in origin and meaning that they ought to be classed, along with religion and freedom of speech and press, as beyond the reach of the majority. Majoritarian control of the transmission of personal beliefs through schooling is a problem whose magnitude is equalled only by our refusal to hold public discussions about it.

A. The First Amendment and Family Choice of Schools

The Supreme Court has eliminated religious indoctrination in public schools[55] but, as we have argued in Section II, the imposition of secular values may constitute as significant an interference with first amendment values as the imposition of religious beliefs. Yet, except when dealing with overt instances of value inculcation such as the compulsory flag salute,[56] the Court has left the establishment of other ideologies untouched.[57]

Having forbidden such overt value inculcation, the government has adopted a "neutral" stance regarding belief formation. The government allows families to inculcate their own values by choosing private schools. The neutrality only involves allowing families to choose schools; there is no attempt to create neutrality in the public school itself or to eliminate compulsory education.[58] Keeping the government or political majority from intervening in family choice of schools prevents the essentially political process of school governance

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[54] *See* M. KATZ, *supra* note 52; D. NASAW, *supra* note 52.

[55] Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

[56] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[57] John Coons, who has written his own brief for family choice, described this problem in referring to Thomas Jefferson's post mortem feelings: "Would he perhaps grieve that the First Amendment reads 'religion' instead of 'ideology'?" NONPUBLIC SCHOOL AID 48 (E. West ed. 1976).

[58] The elimination of compulsory schooling has been suggested, *see, e.g.*, THE TWELVE YEAR SENTENCE (W. Richenbacker ed. 1974), but even this would leave the government in the position of conditioning the provision of a government benefit (tax-supported schooling) upon the sacrifice of first amendment rights. *Cf.* Sherbert v. Verner, 374 U.S. 398, 404 (1963).

from being overburdened by the often irreconcilable value preferences of parents.[59] Thus, whenever a political majority establishes some set of values as central to a school, a dissenting family ought to be able to send its child to another more suitable school. Under such an arrangement, schooling decisions do not have to be resolved by choosing one value over another or by creating an artificial compromise which respects neither value. On a personal level, this policy respects the dignity as well as the personal and cultural values of individuals. On a political level, this policy insures that no group or political majority can use school socialization to maintain or extend its ideology or political power. The democratic process of formulating public policy is thereby preserved.

This entire argument might simply prove that a majoritarian school system is consistent with the tenets of political democracy and individual dignity as long as it provides that dissenting families may send their children to private schools. But as stated above, many, perhaps most, families are too poor to afford private schools. We have created a system of school finance that provides free choice for the rich and compulsory socialization for the poor and working class. The present method of financing and controlling American public schooling discriminates against the poor and working class, and even a large part of the middle class, by conditioning the exercise of first amendment rights of school choice upon an ability to pay, while simultaneously eroding that ability to pay through the regressive collection of taxes used exclusively for public schools.[60] This arrangement seems

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[59] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943):

> As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort. . . . Compulsory unification of opinion achieves only the unanimity of the graveyard.

[60] The problem of choice is to be distinguished from the problem of per capita school expenditures that vary with the district tax base. The Supreme Court has held that this latter phenomenon does not lead to any constitutional violation. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Several states have disagreed. *E.g.*, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *cert. denied*, 432 U.S. 907 (1977); Robinson v. Cahill, 62 N.J. 473, 303

no more defensible than denying a man the right to vote because he cannot afford the poll tax.[61]

The present method of financing and controlling schooling in America is neither accidental nor immutable. We allow the majority to dictate what values school children will learn, and we do not question the collection of tax money from every citizen. Yet, we do not permit the dissenting family to have the benefit of those tax dollars. The family that wishes neither to have its children learn a set of values it finds abhorrent nor to suffer the conflict and alienation which result from competing efforts to control the child's learning must pay private school tuition as well as public school tax. In effect, we confront the dissenting family with a choice between giving up its basic values, as the price of gaining a "free" education in a government school, or paying twice in order to preserve its first amendment rights.[62]

Naturally the burden of forced choices between economic survival and the preservation of personal and cultural values falls most heavily upon the poor, the working class and those minorities that are overrepresented in that segment of society. Unresolvable, self-consuming conflict or unnatural passivity in the face of education "experts" often results. And all the while, our present school ideology tells these same poor and working class persons that the present structure of school is their best hope for an equal place in society. The result is that those who are least able to resist are systematically deprived of their ability to dissent in the molding of their children's minds.

A change in government-created financing mechanisms can rectify the abridgment of the poor's first amendment rights and equalize families' rights to choose schools. This would make real for the majority of families what is now only a hollow constitutional right to avoid public education by using alternative schools.

A.2d 273, *modified,* 63 N.J. 196, 306 A.2d 65, *cert. denied,* 414 U.S. 976 (1973). In any case, the fundamental right to education rejected by the Court in *Rodriguez* is not the same as the accepted fundamental first amendment rights that we argue imply school choice.

[61] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1976).

[62] This payment consists of tuition costs for "private" schooling added to property, income and other taxes supporting "public" schooling. Note 66, *infra,* suggests that such a burden upon rights may be unconstitutional.

B. The First Amendment Inside the School: Conditioning Access to Education on Confessions of Belief

Children whose families cannot exercise their constitutional right to obtain alternative education have no escape from the values of the public school they must attend. Despite the ringing words of Justice Jackson in *West Virginia State Board of Education v. Barnette,*[63] children who wish to succeed in school are forced to confess belief in the dominant school ideology.[64]

Value inculcation, however, is only one aspect of the challenge the public school systems present to first amendment guarantees. Those students who do not share the majoritarian values of the educational establishment may be denied access to the knowledge and skills necessary for them to participate in the political process. Alienation from the dominant value structure may generate disciplinary problems[65] or cause poor performance on standardized tests.[66] In either case, educational doors will close.

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[63] 319 U.S. 524 (1943).

[64] The following personal recollection by Charles Lawrence is illustrative:

> In the fourth grade I was one of two blacks in my class. Each week we began the school assembly by singing *Old Black Joe* and *The Caisson Song.* Occasionally *Carry Me Back to Old Virginny* and the *United States Marines' Song* were substituted. My father was a proud black man and a pacifist. He has studied and worked with W.E.B. DuBois and had been a conscientious objector during World War II. He had taught me and my sisters to be proud to be Negroes and had forbidden us to watch *Amos and Andy* and other TV shows relying on black stereotypes. I recall feeling acutely embarrassed and ashamed as we sang these songs, but I sang along with my friends because they were enjoying it and I didn't want to be different. Were the ritualistic singings of songs that demeaned my race and glorified the military any less acts of confession than the flag salute in *Barnette* or the Bible reading in *Schempp?*
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> I survived these destructive socializing rituals and many others like them because I was fortunate enough to have parents who encouraged me to express my feelings of rage and humiliation and who taught me how to fight in effective but socially acceptable ways. Most children are not so lucky.

[65] C. SILBERMAN, CRISIS IN THE CLASSROOM (1970).

[66] B. GALLAGHER, NAACP REPORT ON MINORITY TESTING (1976); Hilliard, *Standardization and Cultural Bias as Impediments to the Scientific Study and Validation of "Intelligence,"* 12 J. RESEARCH DEV. EDUC. 47 (Winter 1979).

To make effective schooling available to dissenting students only upon compromise of their first amendment freedoms violates the general rule that government benefits may not be conditioned on surrender of constitutional rights.[67] More pointedly, to do so runs counter to the teaching of *Barnette*. In that case, the Court stated:

> The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.[68]

In its holding, the Court clearly rejected the state's asserted power to make education available only to those who would tolerate the school's invasion of "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[69]

Just as the structure of public education subtly undermines the values of the minority, so it deprives the minority of access to education. Thus, it threatens their first amendment right to participate in the political process. Educationally deprived students will be handicapped when they try to participate in that process. Widespread illiteracy, produced in part by conditioning education upon acceptance of dominant values, undermines the validity of that discourse because it prevents increasing numbers of people from effectively voicing their beliefs. As discussed in subsection 4, this illiteracy is an example of society's failure to realize the values imbedded in the first amendment.

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[67] *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976); Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sherbert v. Verner, 374 U.S. 398 (1963). This rule that the state may not accomplish indirectly what it is forbidden to do directly must be strictly adhered to when, as here, the benefit involved is arguably another constitutional right—the fourteenth amendment right to equal educational opportunity. *Cf.* Goss v. Lopez, 419 U.S. 565 (1975). *See generally* Brown v. Board of Educ., 347 U.S. 483 (1954).

[68] 319 U.S. at 603–31.

[69] *Id.* at 642.

1. Disciplinary Action as a Form of Belief Coercion

School discipline constitutes a form of value inculcation that is often overlooked. Children are usually disciplined for behavior that is antisocial in any cultural context. But often the disciplined behavior is merely the tip of the iceberg—the aimless striking out of a young person forced to accept a system of values that deny the student's humanity.

In a case several years ago,[70] a 16-year-old student was expelled from school, along with eight other black students, for participation in a race riot at their recently integrated high school. No white students were expelled. At first blush this seemed a typical due process case with equal protection overtones. But as the case unfolded, it became apparent that the disciplinary problems were a result of a clash in values between the formerly all-white, largely upper-middle-class school and the newly arrived poor black students.

The student's school file described "a pleasant boy" who was "scrappy but well behaved" according to the teachers in the all-black grade schools and junior high he had attended. His attendance and grades at those schools were good. Neighbors knew the same boy. "Always helps his mama out and looks after his brothers and sister." "A well-mannered boy," they said. But at the white high school, he was suspended five times prior to his expulsion for acts such as refusing to take off his hat, cutting classes and talking back to a teacher. He was described as "sullen," "lazy," "uncooperative" and "hostile" in teachers' reports to the administration. Finally, he was expelled for punching a white student during a disturbance involving over a hundred students of both races. The teachers' union threatened to go on strike if he and the eight other black students who had been expelled were readmitted. When asked if he wanted to go back to school, the student shook his head "no."

In order to remain in the good graces of their teachers, this student and his friends would have had to accept a set of attitudes and corresponding behavioral requirements that would have restricted their

[70] Charles Lawrence acted as lawyer in this case. The material referred to here is drawn from his files. The experience of these students is not atypical. For similar cases, see Hawkins v. Coleman, 376 F. Supp 1330 (N.D. Fla. 1973), *aff'd sub nom.* Sweet v. Childs, 507 F.2d 675 (5th Cir. 1975).

development as full human beings and as effective participants in the body politic. The school demanded that they walk and talk and wear their clothes in a way that made their white teachers comfortable. They were expected to remain silent while teachers blamed their poor performance on their lack of intelligence or the conditions of their homes and neighborhoods. In class, they were ignored or ridiculed because, unlike their upper-middle-class white classmates, they did not sound like their teachers when they spoke. When they cut class to avoid embarrassment, they were suspended. If they refused to assimilate they were ostracized as misfits or patronized as underprivileged charity cases.[71]

These young people responded to the school's hostile environment with an increased hostility that expressed itself in the kind of antisocial behavior that provided a rationale for their expulsion from school. The requirement that the school's attitudes be accepted with silent consent was no less a coercive ritualistic confession than a flag salute. It was no less a denial of these students' first amendment rights. They were being trained to be passive, docile, self-denying individuals; the training restricted their first amendment rights of individual development and participation in the political process. If they resisted that training they were denied the right to remain in school, where the

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[71] *See generally* CHILDREN'S DEFENSE FUND OF THE WASHINGTON RESEARCH PROJECT, CHILDREN OUT OF SCHOOL IN AMERICA (1974); CHILDREN'S DEFENSE FUND OF THE WASHINGTON RESEARCH PROJECT, SCHOOL SUSPENSIONS (1975); SOUTHERN REGIONAL COUNCIL AND THE ROBERT F. KENNEDY MEMORIAL, STUDENT PUSHOUT (1973). These studies rely largely upon data collected by the Office of Civil Rights (OCR) of the Department of Health, Education and Welfare in the fall of 1973. As part of its National School Survey of Public Elementary and Secondary Schools, OCR surveyed almost 3,000 school districts, accounting for over 50% of the total enrollment in American public schools and about 90% of all minority students. Brief for Children's Defense Fund of the Washington Research Project, Inc., and The American Friends Service Committee as Amici Curiae at 20, Goss v. Lopez, 419 U.S. 565 (1975). School districts were asked to reveal the total number of students suspended and expelled during the academic year, the cumulative number of suspension days out of school, and the racial and ethnic breakdowns of those figures. *See generally* P. JACKSON, LIFE IN CLASSROOMS (1968); H. KOHL, THIRTY-SIX CHILDREN (1967); S. LIGHTFOOT, WORLDS APART (1978); C. SILBERMAN, *supra* note 65, at 113–57; T. Cottle, *Dying a Different Sort of Death: The Exclusion of Children from School*, 83 SCHOOL REV. 145 (1974).

skills and knowledge necessary for the exercise of those same rights were available.[72]

2. Testing and Tracking as Forms of Belief Coercion

Each year thousands of black and latino children are judged by our schools to be mentally retarded because of low scores on standardized I.Q. tests.[73] Allan Bakke was found to be "better qualified" for admission to medical school than minority students who were admitted through a special admissions program, mainly because of his score on the Medical College Aptitude Test.[74] In South Carolina, California and other states, hundreds of black teachers, many of whom have been successful teachers, are being denied employment because of their scores on the National Teachers Examinations.[75] Standardized testing, an integral part of our educational system, has a devastating impact on blacks and other minorities.

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[72] *See* note 67, *supra,* which discusses the unconstitutionality of conditioning a government benefit (such as education) on surrender of a constitutional right (such as freedom of belief).

[73] B. GALLAGHER, *supra* note 66.

[74] *See* Brief of the Black Students Association at the University of California, Berkeley, School of Law as Amicus Curiae at 2, 4, 16–18, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), *reprinted in* 2 ALLEN BAKKE VERSUS REGENTS OF THE UNIVERSITY OF CALIFORNIA 502, 504, 516–18 (A. Slocum ed. 1978).

[75] *See* United States v. South Carolina, 434 U.S. 1026 (1978), where in a one-sentence opinion, the Court affirmed a three-judge court finding, 445 F. Supp. 1094 (D.S.C. 1977), that South Carolina test-score requirements for teacher certification and salary determination did not violate the fourteenth amendment prohibition against purposeful racial discrimination, even though standards set in 1969 (a time of increasing federal pressure to desegregate South Carolina schools) had the foreseeable effect of eliminating 41% of black candidates, but only 1% of white candidates. 445 F. Supp. at 1101, 1103 & n.9. Relying on Washington v. Davis, 426 U.S. 229 (1976), the district court had determined that the required proof by plaintiff of the state's intent to create and use a racially discriminatory certification policy was not shown. 445 F. Supp. at 1100–07. Defendant's showing of similarity between test content and content of training programs fulfilled the *Washington v. Davis* "rational relationship" requirement. *Id.* at 1112–16.

White, joined by Brennan, dissented, pointing out that the "rational relationship" standard requires proof of the test's relevance to job requirements, rather than its relevance to training programs. 434 U.S. at 1027.

Because standardized tests have had a discriminatory impact on minorities and have operated to deprive them of educational and employment opportunities,[76] they have most often been attacked as a denial of the fourteenth amendment right to equal protection of the law.[77] But the use of standardized testing undermines the first amendment in an equally important way. While the most obvious form of bias in the standardized tests that permeate our educational system is the bias of language,[78] there is often a cultural and ideological bias as well.[79] Dr. Asa Hilliard has noted that "the only way that many

[76] McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651 (1979); White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 HARV. C.R.-C.L. L. REV. 89 (1979); Sorgen, *supra* note 44.

[77] Lewis, *Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Educational Opportunity*, 8 J.L. & EDUC. 145 (1979). *Cf.* P. v. Riles, 343 F. Supp. 1306, 1313 (N.D. Cal. 1972), *aff'd per curiam*, 502 F.2d 963 (9th Cir. 1974).

However, in Washington v. Davis, 426 U.S. 229 (1976), the Supreme Court rejected an equal protection challenge to the civil service examination used to select police for the District of Columbia. Stating that a violation of the equal protection clause requires a showing of intentional discrimination, the Court held in effect that a state does not violate the equal protection clause by the use of a selection device that has a foreseeable discriminatory impact so long as racial discrimination was not the motivating factor. *Id.* at 239, 247–48. The holding is particularly anomalous in light of the Court's failure to recognize the causal relationship between D.C.'s de jure segregated school system, *see* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), and the poor performance of blacks on its civil service exam.

[78] *See* Serna v. Portales Mun. Schools, 499 F.2d 1147, 1149–50 (10th Cir. 1974). *See generally* Lau v. Nichols, 414 U.S. 563 (1974).

[79] *Cf.* Martin Luther King, Jr., Elementary School Children v. Ann Arbor School Dist., 473 F. Supp. 1371, 1371–73 (E.D. Mich. 1979) (cultural differences in language impede learning). *See* White, *supra* note 76, at 100–02 (standardized tests poor predictors of performance); *id.* at 107–23 (cultural bias helps explain inaccuracy). Moreover, certain studies indicate that the vast majority of standardized tests employed by school systems are specifically biased against racial minorities and the poor. *See* P. v. Riles, 343 F. Supp. 1306, 1313 (N.D. Cal. 1972), *aff'd per curiam*, 502 F.2d 963 (9th Cir. 1974). These studies present only the tip of the iceberg, however; they do not consider the issue of cultural bias in the content of the tests. For a discussion of such bias, see Hilliard, *supra* note 66. In considering racial or class bias in standardized tests, educational psychologists have limited their inquiry to determining the presence of statistical bias or predictive validity. For example, the researcher

Europeans or European-Americans have been able to observe Africans or African-Americans has been as a perceived deviation from a European or European-American 'norm'."[80] He refers to this form of assessment as the "Type I" question. It takes the form, "Do you know what I know?" Type I questions characterize almost all standardized testing. A Type II question begins from an entirely different point, and takes the form, "What is it that you know?"[81]

The standardized Type I question is not only an inaccurate measure of the minority individual's intelligence or ability to learn, it is also a tool of belief coercion. In order to score well on the test, the test taker must "confess belief" in the values and world view of the tester.[82]

The National Teachers Examinations, for example, affect the lives of hundreds of thousands of black children and tens of thousands of black teachers. It has already resulted in the denial of employment to many competent black teachers.[83] The Educational Testing Service, which designs and administers the NTE, has declared that the "primary function of the NTE is to provide objective, standardized measures of knowledge and skills developed in teacher training pro-

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will ask whether the Law School Admissions Test predicts the performance of blacks in their first year of law school with the same accuracy that it predicts that of whites. *See* White, *supra* note 76. Ironically, however, the researcher is measuring the bias of the test by evaluating its predictive ability in a scholastic setting that may itself be biased. The LSAT may be an accurate predictor of first-year grades in law school because it is designed to measure the applicant's ability to perform on first year law exams; yet, it has never been shown that the traditional law school curriculum and examination process either teaches or measures those qualities essential to good lawyering. For an excellent discussion of the history of the use of standardized tests as barriers to the legal profession, see White, *The Definition of Legal Competence: Will the Circle be Unbroken?* 18 SANTA CLARA L. REV. 641, 662–74 (1978).

[80] Hilliard, *Standardized Testing and African-Americans Building Assessor Competence in Systematic Assessment* (Position paper presented to the National Institute for Community Development, National Task Force on Standardized Testing, August, 1978), 6–7.

[81] Hilliard, *Alternatives to I.Q. Testing: An Approach to the Identification of Gifted "Minority" Children,* Final report to the California State Department of Education (ERIC Clearinghouse on Early Childhood Education, Document No. 147.009 (1976)), 44.

[82] *Id.* at 44–60.

[83] *See* United States v. South Carolina, 445 F. Supp. 1094 (1977), *aff'd,* 434 U.S. 1026 (1978).

grams." ETS expressly cautions that "[t]he information gained from the NTE is significant but limited. . . . [T]he NTE can properly be said to measure only a part, but a necessary part, of preparation for teaching."[84]

The claim by ETS that the NTE is an "objective, standardized" measure of teacher skills assumes that there is a standard curriculum for teacher preparation nationwide.[85] No such curriculum exists. Nor has there been any attempt to demonstrate that it does.[86] Moreover, to the extent that there is a common content to the curriculum of American education, it is a content permeated with European-American ethnocentrism. Again, Hilliard has pointed out that such a test *must* be biased against Afro-Americans as it is based on over four hundred years of academic bias in scholarship.[87]

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[84] NTE POLICY COUNCIL, GUIDELINES FOR USING THE NATIONAL TEACHER EXAMINATIONS 1 (1979).

[85] *Id.* (the NTE "reflect curriculum areas and content common to most teacher education programs in the United States").

[86] Indeed, the NTE Council encourages comments from educators "who have noted substantial discrepancies between the test content and the academic training expected of prospective teachers." *Id.*

[87] Hilliard, *supra* note 80, at 24:

> African-Americans have the right as citizens and the human right not to be required to become "expert achievers" in test content which may well be biased against African-Americans. For example, a test of general information and history which failed to treat the activity of Toussaint L'Overture, Marcus Garvey, Edward Wilmont Blyden, Carter G. Woodson, Paul Robeson, Ira Aldredge, and others who have been heroic in the struggle for the liberation of African-Americans, would represent gross misinformation for African-American people. In reading the questions on the *NTE*, the College Boards, the Iowa Test of Educational Development, and other standardized tests of achievements, one would get the impression that African-Americans were non-existent and that the condition of slavery and other forms of oppression were unimportant for an educated person. Indeed, to be judged as a competent teacher by the NTE in South Carolina no less, or elsewhere, some African-Americans would have to commit cultural suicide.

The implications of Hilliard's observations about the enthnocentrism of the NTE and other standardized tests go far beyond an argument for the exclusion of a few obviously biased history questions and the inclusion of a few items dealing with "black history." Social science scholarship has portrayed black family life and culture as pathological (*see* S. LIGHTFOOT, *supra* note 71, at 125–75). Curriculum in language and literature ignores the literary contributions of blacks and characterizes their language as an undeveloped dialect—and therefore proof of their inferiority.

Increasingly the ability of individuals from minority subcultures to gain access to effective education in grade school and high school, not to mention admission to college, professional school or professional certification, depends upon their ability to succeed on examinations that adopt the values of their oppressors.[88] Our educational sys-

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For additional material on racial bias in education and scholarship, see L. CARLSON & G. COLBURN, IN THEIR PLACE (1972); A. CHASE, THE LEGACY OF MALTHUS (1977); T. GOSSETT, RACE (1973); R. GUTHRIE, EVEN THE RAT WAS WHITE (1976); J. HODGE, D. STRUCKMAN & L. FROST, CULTURAL BASES FOR RACISM AND GROUP OPPRESSION (1975); L. KAMIN, THE SCIENCE AND POLITICS OF I. Q. (1974); D. LACY, THE WHITE USE OF BLACKS IN AMERICA (1973); W. STANTON, THE LEOPARD'S SPOTS (1969); A. THOMAS & S. SILLEN, RACISM AND PSYCHIATRY (1972); *The White Researcher in Black Society* (C. X (Clark) ed.), 29 J. SOC. ISSUES 1 (1973).

[88] The opportunity to gain an education is frequently conditioned upon performance on standardized tests. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd per curiam*, 502 F.2d 963 (9th Cir. 1974); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). Because standardized tests contain biases in favor of the world view of those who control our political and educational institutions, blacks and other oppressed minorities must sacrifice their own beliefs and confess to the majoritarian ideology if they wish continued access to the benefit of education. *See generally* Clauge, *Competency Testing and Potential Constitutional Challenges of "Everystudent,"* 28 CATH. U. L. REV. 469 (1979).

> In January, 1977, the Maryland State Department of Education expressed an official philosophy of education in two . . . policy statements [which] broaden the concept of minimum adult competence far beyond mastery of "basic skills" . . . and include . . . "citizenship", "survival skills"—including "inter-personal skills" and "parenting"—and the "world of work". In the fall of 1977, a draft list of approximately 600 competencies was generated by advisory panels of professional educators and laypersons at the initiative of Maryland's Project Basic staff. Grouped and identified with each of the five human activity areas, the competencies expressed as "behaviors" were then winnowed down to 321 "possible prerequisites for graduation" . . . . Numerous items on the draft list probed the highly sensitive areas of feeling and opinion, although none of these items may survive the next stages in the development of the state's competency tests. In late July of 1978, the Maryland Board of Education approved a "Declared Competency Index." . . . Although many of the value-loaded items on the draft list distributed for public validation have or may be discarded, they nonetheless serve as useful illustrations of the kinds of competencies which, if transformed into mandatory test questions, may raise first and fourteenth amendment challenges.

Id. at 472–73.

tem in general and the ubiquitous use of standardized tests in particular force those without power in society either to accept the values of the powerful or to risk punishment for holding beliefs that are unacceptable to their oppressors but may well be essential to their own survival.[89]

3. Literacy, Value Inculcation and the Seeds of Revolution

In today's society, literacy is a requirement for effective participation in the political process. But if our schools require that poor young people adopt the beliefs and behavior of those who oppress them as a price for obtaining that skill, it should not be surprising that they reject the process and cling to their humanity.

A 1975 Office of Education study indicated that 22 percent of Americans over 17 are illiterate and another 32 percent are only marginally literate.[90] James Harris, past president of the National Education Association, noted in 1975 that 23 percent of all school children fail to graduate from high school and that a large segment of those who do graduate are functionally illiterate.[91] While the situation is dismal for all American school children, it is particularly bleak for minorities who are disproportionately represented in these illiteracy statistics. Persons of Spanish origin have an illiteracy rate more than twice that of the population as a whole, and 85 percent of black students do not read as well as the average white student. In 1975, 87 percent of the elementary and junior high school students in Central Harlem failed their standardized tests in reading.[92]

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[89] Of course, to take an effective part in American politics and business, minority individuals need a command of standard English and basic mathematics as well as a grounding in economics and in political procedures. We do not suggest that these subjects, although largely the products of white culture, are so culturally biased that they should not be taught to minorities. We object here only to tests which, while purporting to be neutral, actually condition advancement on a profession of belief in the political, social and economic beliefs of the school administrators.

[90] N. HENTOFF, DOES ANYBODY GIVE A DAMN? 55 (1977).

[91] *Id.* at 55. "[A] person is functionally literate when he has acquired the knowledge and skills in reading and writing which enable him to engage effectively in all those activities in which literacy is normally assumed in his culture or group." W. GRAY, THE TEACHING OF READING AND WRITING 24 (1956).

[92] N. HENTOFF, *supra* note 90, at 55–56; C. SMITH & L. FAY, GETTING PEOPLE TO READ (1973). While the standardized tests referred to here are not without cultural

The direct link between the literacy of our citizens and the vitality of our political system has been recognized since the nation's early years.[93] However, widespread illiteracy burdens the political process in today's technologically sophisticated world more severely than it did in the fledgling agrarian democracy Washington knew. When political debate occurred in barbershops, on street corners and in town meetings, the man who could not read or understand the fluctuations of the international money market was not at a substantial disadvantage. But today the barbershop debate hardly constitutes the mainstream of the decisionmaking process.

Functional illiteracy is usually defined by reference to an individual's ability to read instructions, fill out forms and perform other everyday reading and writing tasks which are vital to one's independence and well being.[94] In first amendment terms, however, an individual is functionally illiterate if he does not have the skills necessary to understand what is happening in the political system and to participate effectively in that system by voicing his views. If illiteracy were measured as a function of one's ability to participate in the political process, it would be apparent that the problem is even graver than has been imagined.

This recognition of the effect of illiteracy on the process that the first amendment is designed to protect is important. Without the skills necessary to gather information or communicate one's ideas and beliefs, an individual is denied even minimal participation in the political debate. There is another way, however, in which widespread illiteracy acts to hinder the free flow of ideas. Those who are unable to participate in the governing process because of their inability to recognize or articulate their self-interests or the nature of their oppression become dehumanized. When individuals are deprived of all control

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bias, the fact that they claim to measure achievement (i.e., how well has a child learned to read standard English) rather than aptitude (does a child have sufficient intelligence to learn to read?) makes them somewhat less problematic.

[93] For example, George Washington urged in his Farewell Address: "Promote then as an object of primary importance, Institutions for the general diffusion of knowledge. In proportion as the structure of government gives force to public opinion, it is essential that public opinion should be enlightened." 35 THE WRITINGS OF GEORGE WASHINGTON 230 (J. Fitzpatrick ed. 1940).

[94] *See* note 91 *supra*.

over their own destiny and are treated by the rest of society as objects, they come to believe they are less than human and therefore unworthy of participating in the political process.[95]

Educators will surely respond that they are not responsible for these first amendment deprivations. After all, they have offered these young people an opportunity to read; it is not their fault that their offers have been rejected. But, as has been argued, that offer was made with substantial conditions impossible for these young people to accept. Typically, the teachers of ghetto minority children who refuse to learn believe that the children's world is dirty, ignorant and immoral; the teachers accept a view of the world that says that these children and those they love are at fault. The school's value system labels the children's fathers as lazy deserters, their mothers as immoral whores and their older brothers and sisters as criminals. Those who profess to educate them accept no responsibility for their condition other than to ask them to reject it.[96]

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[95] An analogy may be drawn between the situation of contemporary ghetto youth and that of slaves in states where it was forbidden to teach slaves to read or write. The master who forbade his slaves to learn to read did so to inhibit their ability to communicate. But he also sought to dehumanize the slave by denying him information about the world around him and by limiting his ability to control that world. *See* L. BENNETT, BEFORE THE MAYFLOWER 129 (1966); F. DOUGLAS, LIFE AND TIMES OF FREDERICK DOUGLASS 76 (1892); L. HIGGINBOTHAM, IN THE MATTER OF COLOR 198 (1978); R. KLUGER, SIMPLE JUSTICE 13 (1975). Today, oppressed illiterates are heavily concentrated in our urban ghettos and their condition can be likened to that which Freire has termed the "culture of silence." P. FREIRE, *supra* note 2, at 10–11.

[96] *See* note 67 *supra*. The following excerpts from Herbert Kohl's THIRTY-SIX CHILDREN, and Charles Silberman's CRISIS IN THE CLASSROOM, are but two examples of a story that is told hundreds of times in these studies cited above.

> After a while the word "animal" came to epitomize for me most teachers' ambiguous relations to ghetto children—the scorn and the fear, the condescension yet the acknowledgment of some imagined power and unpredictability. I recognized some of that in myself, but never reached the sad point of denying my fear and uncertainty by projecting fearsome and unpredictable characteristics on the children and using them in class as some last primitive weapon. It was pitiful yet disgusting, all the talk of "them," "these children," "animals." I remember a teacher from another school I taught in, a white Southerner with good intentions and subtle and unacknowledged prejudices. He fought for the good part of a semester to gain the children's attention and affection. He wanted the children to listen to him, to respond to him, to learn from him: yet never thought to listen, respond, or learn from

These young people who refuse to learn to read provide us with the most basic understanding of the conflict between our present modes of schooling and the command of the first amendment. When alien values are imposed upon an individual, that individual gives up his identity. He is required to abandon that which is most crucial to his sense of selfhood: his own unique view of the world around him. The purpose of the first amendment is to protect the individual from government-imposed uniformity, but only when each person is free to bring his own view of the world to the self-governing process is the vitality of that process protected.

The application of a first amendment protection to the development of belief inside schools indicates that it is not only in the absence of parental choice that families, especially minority families, suffer manipulation of their children's consciousness. Practices such as standardized testing, and policies that fail to recognize and respect cultural differences in the name of discipline or literacy all contribute to a broad denial of first amendment freedoms for children and families. In

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> the children, who remained unresponsive, even sullen. They refused to learn, laughed at his professed good intentions, and tested him beyond his endurance. One day in rage and vexation it all came out.
>
> "Animals, that's what you are, animals, wild animals, that's all you are or can be."
>
> His pupils were relieved to hear it at last, their suspicions confirmed. They rose in calm unison and slowly circled the raging trapped teacher, chanting, "We are animals, we are animals, we are animals . . . ." until the bell rang and mercifully broke the spell. The children ran off, leaving the broken, confused man wondering what he'd done, convinced that he had always been of goodwill but that "they" just couldn't be reached.

H. KOHL, THIRTY-SIX CHILDREN 187–88 (1967).

> ITEM: A sixth-grade class in a racially mixed school. A black girl calls out the answer to a question the teacher had asked of the entire class. "Don't you call out," the teacher responds. "You sit where I put you and be quiet." A few minutes later, when a blond-haired, blue-eyed girl calls out an answer to another question, the teacher responds, "Very good, Annette; that's good thinking."
>
> ITEM: A fifth-grade class in a racially-mixed school. A black youngster has his hand raised to ask a question; before the teacher can respond, the principal, who is visiting, tells the child, "Put your dirty hand down and stop bothering the teacher with questions."

C. SILBERMAN, CRISIS IN THE CLASSROOM 92 (1970).

considering proposed mechanisms for restoring first amendment liberty to American education, it is essential to recognize all the means by which first amendment rights have been and could continue to be denied. The provision of parental choice alone would still leave practices such as standardized testing as forceful denials of first amendment liberties.

IV. FUTURE DIRECTIONS: RECONCILING LIBERTY AND RACIAL EQUALITY

This article has focused upon an understanding of the first amendment as a protector of individual consciousness and upon the application of this understanding to schooling in America. We have sought to demonstrate ways in which the structure and ideological orientation of our school system constitute a massive infringement of the first amendment; but we have neither analyzed nor advocated any particular solution to this problem. We have avoided "utilitarianism" in part because we fear that the attempt to identify and discuss the basic first amendment problems of schooling might be lost in an attack upon any proposed solution.

Throughout our discussion of value transmission and cultural conflict in schooling, our underlying concern has been with the power of individuals and families over the formation of belief and with the unfettered access of these persons to the political debate protected by the first amendment. Whenever the problems of power and political access are raised in the context of schooling, the question of racism must also be addressed. History, law and politics impose this dilemma upon us. Because there are in fact several conceivable solutions to first amendment problems in schooling, and because these solutions would all have effects on racism, we have chosen to examine directly the implications of our first amendment concerns for racial equality. There are two broad groups of remedies that could lessen the infringement of first amendment rights by schools: 1) those remedies that provide families with increased choice[97] among schools and therefore imply a conflict between family choice and racial equality, and 2) those reme-

[97] The term "family choice" and much of the thinking behind it belong to John Coons and Stephen Sugarman. *See* J. COONS & S. SUGARMAN, EDUCATION BY CHOICE (1978).

dies that reduce the imposition of values within schools and therefore imply that liberty and racial equality are not in conflict. Our discussion of these two groups of remedies will not be exhaustive of first amendment problems in a government-run school system. Our purpose is to suggest the thinking necessary to reconcile educational liberty and racial equality once the importance of these two principles has been recognized.

A. Where Educational Choice and Racial Equality Conflict

A number of plans have been suggested or are conceivable[98] that might substantially increase the ability of all families to choose their children's schools without suffering additional school tax or tuition burdens. Under these plans the choice exercised by families would remove or substantially lessen the coercive socialization of children with values not in harmony with those of the family. The question is whether such plans can be compatible with racial equality in schooling.[99]

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[98] *See id.* at 190–211. *See also* The Center for the Study of Public Policy, EDUCATION VOUCHERS (1970). In 1976, there was an unsuccessful attempt to amend Michigan's constitution to create a voucher system. In 1980, an unsuccessful effort was made to place on the California ballot a proposition that would have made a similar change in their state's constitution. The California proposition would have created a system of state tuition tax credits of up to $1200/child. Such credits would permit corporations, unions and wealthy individuals to receive tax credits for contributions to schools willing to enroll students from poorer families, thus making it possible for those families to lose control of the education of their own children.

[99] There are of course other serious questions about the desirability of family choice plans even when they are seen as vindicating first amendment rights by minimizing government-sponsored manipulation of consciousness in schools. These questions fall into six broad categories: (1) religious domination—the fear that family choice in schooling is simply a cover for attempts by the major organized religions such as the Catholic Church to gain control of large parts of the public treasury; (2) civil liberties—the fear that those most likely to take advantage of a right of school choice are those least likely to support civil liberties and most likely to seek to spread intolerance; (3) need for social cohesion—the belief that public schools attended by almost all children and controlled by the majority provide one of America's only forums for creating a cohesive society able to define and meet national goals; (4) balkanization—the fear that if all families and subgroups can pursue their own values, the society will become hopelessly fragmented, probably on the basis of class, eco-

Although we have suggested that the first and fourteenth amendments are twin guardians of the political process,[100] history indicates that these two broad principles of constitutional order may be at odds where racial equality is concerned. When choice among schools is the issue, the first and fourteenth amendments may appear to be in direct and irreconcilable conflict. Such a conflict was suggested during the early resistance to school desegregation when the claim was made that rights of free association were as important as the rights to equal educational opportunities and an end to segregated schooling.[101] The history of the attempt to create racially equitable schooling supplies more evidence than necessary to prove that schemes for free choice in schooling can easily become methods for preserving forced segregation, denying equal educational resources and stigmatizing minorities.[102] White privilege has often come at black expense in the sorry history of the races in America.

1. Overview of Racism and Family Choice Since 1954

After the Supreme Court declared school segregation unconstitutional in 1954, some school districts resisted eliminating racism by adopting tuition vouchers or grant-in-aid plans that effectively preserved white-only schools. In 1967, the Louisiana legislature, stating

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nomic status, religion and political persuasion, as well as race; (5) expertise—the belief that only education experts have the knowledge and ability to create a good education and that more parental control will undermine the objective quality of education; and (6) technocracy—the belief that the technocratic and inequitable values often found in public school bureaucracies are so pervasive in other American institutions such as television and school-text industries that a family may not be able to increase noticeably its influence over child-rearing through school choice.

Each of these problems deserves serious consideration and analysis, analysis which will only be forthcoming after recognition of the threat to the first amendment posed by economic discrimination in availability of school choice. But because the "color line" continues to be America's most fundamental dilemma, the problem of racism and liberty in schooling commands the greatest attention in this article.

[100] *See* text accompanying notes 43–51 *supra*.

[101] *See* Northcross v. Board of Educ., 466 F.2d 890, 898 (6th Cir. 1972) (Weick, J., dissenting), *cert. denied*, 410 U.S. 926 (1973). *See also* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

[102] *See* text accompanying notes 103–09 *infra*.

that it was "mindful that the parent, not the State of Louisiana, shall be the determining force which shall decide on the type of education ultimately received by the child," declared that it was "the policy of this state to provide financial aid scholarships to needy children enrolled in private non-sectarian schools . . . in [the] state whose parents choose not to enroll said children in the public education facilities."[103] This statute and an earlier one,[104] both of which had provided tuition expenses to all children attending state-approved private schools, were invalidated in *Poindexter v. Louisiana.*[105] Holding that both the effects and the purposes of the laws were impermissible, the court said that "[t]he inevitable effect of the tuition grants was the establishment and maintenance of a state supported system of segregated schools for white children, making the state a party to organized private discrimination."[106]

In an even more blatant attempt to circumvent an order of the federal courts, Prince Edward County in Virginia eliminated its public schools altogether and provided "scholarships" for those children attending the white academies in the county. The plan was ruled illegal after several years,[107] but not before it had contributed to the notion that parental choice is synonymous with racial discrimination.

Even without using tuition or scholarship aid, states and school districts have attempted to preserve discriminatory patterns in schooling by appealing to the notion of free choice and the natural desire of parents to have significant influence over the education of their children. In 1968, the Supreme Court's ruling in *Green v. County School Board*[108] made it clear that while "freedom of choice" plans might not be unconstitutional in and of themselves, they are unacceptable so long as there are other methods which promise "speedier and more effective conversion to a unitary nonracial school system."[109] The existence of racially identifiable schools in a school district may be

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[103] 1967 La. Acts No. 99, §2.

[104] 1962 La. Acts No. 147.

[105] Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam,* 389 U.S. 571 (1968).

[106] *Id.* at 845.

[107] Griffin v. County School Bd., 377 U.S. 218 (1964).

[108] Green v. County School Bd., 391 U.S. 430 (1968).

[109] *Id.* at 441.

cited as evidence of invidious discrimination in school policy. Parental choice may also lead to racially identifiable schools; and free choice and racial equality become antagonists.[110]

The history of the relationship of racism and parental choice does not encourage the view that the first and fourteenth amendment principles are compatible where school choice is the issue. But, imagine that the public, and especially poor and working-class minorities, were to realize the importance of eliminating economic discrimination in first amendment schooling rights, and were to demand a system in which every parent had an equal ability to choose his child's school. Would the result simply be a return to racism in schools? Can racist choices be prohibited while preserving the general operation of parental liberty in school choice?

In another society and at another time it might not be necessary to single out some family choices for prohibition; but, as American history demonstrates, whites have so persistently and systematically victimized blacks that we must resist the accumulated and institutionalized racism of the past by erecting specific safeguards and by taking remedial actions in the present. And so we must ask whether the existing legal and political protections against racism would be strong and reliable enough to prevent clashes between family choice and racial equality.

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[110] Some persons have not only opposed systems which permit "black" or "white" schools, but have also favored integration as the only justifiable expression of racial equality in schools. It is possible, however, that the formulation of schooling issues in such absolute categories ignores reality. Opposition to freedom of choice for all families may in part be fabricated by a disingenuous appeal to racial equality, just as support for some tuition voucher plans has been fabricated in part by a disingenuous appeal to parental liberty. Racially identifiable schools are not necessarily providing poor education or promoting racism, and integrated schooling may in some instances be a violation of the rights of equal education of minority families. *See* Moss v. Stanford Bd. of Educ., 350 F. Supp. 879 (D. Conn. 1972) (integration plan may not place disproportionate burden on black students). The fact that a minority family may choose a racially identifiable school, thereby perpetuating the school's identifiability, does not mean that the education provided there is inferior or that the family has been denied its rights under the fourteenth amendment. The education of children within a culturally supportive atmosphere may be an important quality, both to the child's education and to the family's and subgroup's ability to preserve its unique heritage and values. In fact, a blind pursuit of racial integration, without attention to the values and desires of minority parents, may be as offensive a form of racism as coercive separation and stigmatization of minority parents.

2. Existing Protections Against Racism

There are three basic protections against racial discrimination in school admissions and the distribution of school benefits. First, the fourteenth amendment prohibits such discriminatory practices wherever it can be shown that the government is intentionally involved in perpetuating or condoning such practices. To the extent that school tax funds are used at nongovernment schools pursuant to family choice, sufficient state action could be found to prohibit racial discrimination.[111] Relying on private parties to ferret out and file suit against discriminatory admissions or distribution of benefits, however, may not be the most effective way of eliminating such practices, especially considering the cost, in time and money, of litigation.

A second source of protection against discrimination lies in federal legislation, especially Title VI of the Civil Rights Act of 1964,[112] which provides that no organization shall discriminate on the basis of race, among other grounds, in the distribution of federal benefits. Insofar as private schools chosen by families receive federal funds, Title VI would apply. Federal aid to private schools is not substantial, however, and few schools might actually be covered; and the same problems of private enforcement make Title VI weaker than it might appear.

Finally, as a third source of protection, there is the denial of nonprofit tax status to discriminatory schools by the Internal Revenue

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[111] *See* Norwood v. Harrison, 413 U.S. 455, 467 (1973) (Constitution prohibits a state from "giving significant aid to institutions that practice racial or other invidious discrimination"). It is possible, of course, that under a voucher plan the presence of tax dollars (through voucher reimbursement) in independent schools would create sufficient state action to make the fourteenth amendment applicable on issues of race. At the same time, proponents of including religious schools in the voucher plan would undoubtedly argue that the intervening family choice of which school is attended and thereby funded and the applicability of vouchers to *all* schools would eliminate the threat of a violation of the establishment clause of the first amendment. In this way the proponents of family choice and the proponents of racial equality would be put at doctrinal odds even if they shared objective interests. It is a problem that asks for a doctrine capable of harmonizing the establishment and equal protection clauses through adoption of a more flexible and realistic view of state action. *See* note 1, *supra*.

[112] 42 U.S.C. §§ 2000d to 2000d-6 (1976).

Service. A recent attempt by the IRS to promulgate rules[113] that would make the enforcement of nondiscrimination requirements through denial of tax exempt status more effective has been stalled through vigorous resistance by much of the private school sector.[114]

The Supreme Court has consistently rejected the argument that the first amendment requires the government to assume a neutral stance vis-à-vis privately initiated racial discrimination.[115] In *Norwood v. Harrison,*[116] the Court held unconstitutional a Mississippi program in which textbooks were purchased by the state and loaned to students in both public and private schools, including private schools with racially discriminatory policies. Chief Justice Burger noted:

> although the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.[117]

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[113] Proposed Revenue Procedure on Private Tax-Exempt Schools, 44 Fed. Reg. 9451 (1979). The proposal provided elaborate criteria for determining whether a school is "a reviewable school," i.e., one created or expanded as a result of public school desegregation and having a small number of minority students. "Reviewable schools" and "adjudicated schools" (those found by a court or agency to engage in discrimination) would lose tax-exempt status unless they took affirmative remedial efforts. *Id.* at 9454. *See also* Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations,* 79 COLUM. L. REV. 1514, 1527–33 (1979).

[114] Congress voted to postpone the enforcement of these regulations for at least a year from September 6, 1979. The vote followed an earlier decision to cut off funds for the efforts by the Internal Revenue Service to end the tax-exemption for discriminatory schools. *See* Treasury, Postal Service and General Government Appropriation Act of 1980, Pub. L. No. 96-74, § 103, 93 Stat. 559 (1979).

[115] *See* Runyon v. McCrary, 427 U.S. 160, 175–79 (1976); Norwood v. Harrison, 413 U.S. 455 (1973).

[116] 413 U.S. 455 (1973).

[117] *Id.* at 470. The Court explained that the Constitution allows much less aid to segregated schools than to sectarian schools. The constitutional value of the free exercise clause acts as a balance for the establishment clause and permits some aid to religious schools. But since the Constitution "places no value on discrimination . . . ,

B. Teaching Racism

The most difficult aspect of the conflict between first and fourteenth amendment principles arises from the teaching of racist doctrine or values in schools operating under a parental choice system. It might be expected that under a family choice plan, children would attend any school voluntarily and that families would have an increased and more intimate influence on the values taught at the children's schools. But even if some families have the time and energy to exercise this influence, others may, through ignorance, convenience or ideological compatibility, select schools that foster racism. Thus, the government, by subsidizing the right of family choice, will in effect subsidize racist teaching. These schools may avoid detection because the victims of their ideology do not attend their schools and do not directly confront the human reality of their twisted thinking. In such a circumstance, a minority group loses any semblance of control or even influence over an ideology that directly victimizes it. For, even if minority children do not attend a particular school, a stigma, generated through the teaching of racism, attaches to its victims; more fuel is added to a fire that burns only a minority of the population.

If a school taught a set of attitudes or values other than racist ones—for example, if it taught collective rather than competitive living, or exploratory rather than authoritarian learning—an enlightened public would not be moved to intervene. Certainly, the concept of individual rights of freedom of expression and belief articulated in the first part of this essay argues against any such intervention by the majority. Each person and group has a right both to hold and to teach whatever values it pleases.

The first amendment tells us that no matter how odious a majority may find the existence or expression of an idea to be, no matter how corrupt or twisted that idea may seem, its expression cannot be suppressed. Such ideas may be argued against, exposed or ridiculed,

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the channel of permissible state aid to sectarian schools . . . permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system." *Id.* at 469–70. A district court has suggested that although tax exemptions for religious institutions are constitutional, similar exemptions for religiously sponsored segregation academies would be unconstitutional. Green v. Connally, 330 F. Supp. 1150, 1164–70 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

but the power of the state may not be used to suppress them. But where, as with government-subsidized racism, the thirteenth and fourteenth amendments clash with the first amendment, this absolute position needs reexamination.

In *Runyon v. McCrary,*[118] a case holding that the Civil Rights Act of 1866[119] prohibits private, nonsectarian schools from denying admission to blacks, the Court indicated that its earlier holding in *Norwood* had not raised the question of whether the first amendment protected the teaching of racially discriminatory subject matter or values in private schools.[120] But the reasoning in *Norwood, Poindexter* and other cases extending the equal educational opportunity principle of *Brown v. Board of Education*[121] to private schools receiving government support would seem to require the same result where, although admissions procedures are nondiscriminatory, the curriculum remains racist.

The advocacy of white supremacy in a school subject to the mandate of *Brown* constitutes speech inseparable from forbidden conduct. Such advocacy is not simply expression; it is teaching and urging that, being acts of racism in themselves, pose the clear and present danger of creating the stigmatization forbidden by the thirteenth and fourteenth amendments.[122] If a discriminatory admissions policy violates *Brown* because segregation stigmatizes the black child and

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[118] 427 U.S. 160 (1976).

[119] 42 U.S.C. § 1981 (1976).

[120] "It is clear that the present application of § 1981 infringes no parental right recognized in *Meyer, Pierce, Yoder* or *Norwood* . . . Nor do these cases involve a challenge to the subject matter which is taught in any private school. Thus, the [schools] remain presumptively free to inculcate whatever values and standards they deem desirable. *Meyer* and its progeny entitle them to no more." *Id.* at 177.

[121] 347 U.S. 485 (1954).

[122] The advocacy of racial supremacy in state supported schools is distinguishable from Brandenburg v. Ohio, 395 U.S. 444 (1969), where the court found such advocacy protected by the first amendment, in two regards: 1) In *Brandenburg,* there was an absence of government involvement with the speaker, eliminating the argument that the state had an independent interest in avoiding its own involvement in discrimination; 2) in *Brandenburg,* the clear-and-present-danger test was not met because the danger or unlawful act (violence against blacks and Jews) was not sufficiently proximate. However, the same words spoken in a school would accomplish the harm (stigmatizing blacks) as soon as they were uttered.

thereby denies him an equal educational opportunity,[123] then clearly a school that imposes the stigma more directly by teaching its students that blacks are inferior likewise violates the equal protection clause.[124] And, of course, the teaching of racially discriminatory values will have the obvious and foreseeable effect of deterring attendance by black children.[125] Such transparently coercive "free choice" has been firmly rejected by the Court.[126]

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[123] 347 U.S. at 494.

[124] *See* Cook v. Hudson, 365 F. Supp. 855 (N.D. Miss. 1973), *aff'd per curiam*, 511 F.2d 744 (5th Cir. 1975), in which the court upheld the discharge of public school teachers who sent their own children to a private segregated academy, despite their argument that their right to freedom of association was thereby infringed. The trial court stated that "students in desegregated classes are likely to perceive rejection, and experience a sense of inferiority, from a teacher whose own children attend a nearby racially segregated school, and be inclined to perform at a lower educational level." *Id.* at 860. *See also* Smith v. St. Tammany Parish School Bd., 316 F. Supp. 1174 (E.D. La. 1970), *aff'd per curiam*, 448 F.2d 414 (5th Cir. 1971), in which the court ordered the removal of the Confederate battle flag from a school principal's office on the grounds that it had "become a symbol of resistance to school integration and, to some, a symbol of white racism in general" and was "not constitutionally permissible in a unitary school system where both white and black students attend school together." *Id.* at 1176.

[125] *Cf.* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979) (in equal protection challenges to allegedly segregative policy of school board, "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose"). *Accord,* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 n.9 (1979).

Such teaching of racist subject matter and values is distinguishable from the situation in Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973), in which a state university was enjoined from coercing its student newspaper which had published prosegregation editorials. The court held that the student editors' first amendment rights had been infringed by the cut off of university funds, although the equal protection clause would have *required* a funding cut off if the newspaper had segregated its staff. Since the staff was not shown to be segregated and since the editorials did not actively obstruct the efforts to desegregate the university, the university could not interfere. *Id.* at 463. Thus, propagating racism appears to be unconstitutional only if it leads to segregation. This principle also distinguishes the case of a professor at a state university who begins to teach racism. Since one man's opinions are not likely to promote the segregation of an entire university, the fourteenth amendment would not require cutting off his salary and the first amendment would very likely forbid it. *See* Perry v. Sindermann, 408 U.S. 593 (1972).

[126] *See* Green v. New Kent County Bd. of Educ., 391 U.S. 430 (1968).

An alternative approach might be used when considering the constitutionality of government regulation of the teaching of racism. If the government's purpose is seen not as suppression of racist speech but as furthering the constitutionally compelled goal of avoiding state-sponsored stigmatization of blacks or segregation, then the regulation may be characterized as one that places an incidental burden on speech.[127] The ban on racist expression in schools would be a side effect of achieving the thirteenth and fourteenth amendment goals of removing the stigma and achieving full citizenship for blacks. Such a ban would not constitute an effort to suppress racist ideas *per se* but would only involve their restriction in those places, such as schools, where the government deems it necessary to achieve nonspeech related goals.[128]

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[127] Whenever possible the Court has avoided being placed in the position of having to rank competing constitutional values. Most often it has done so by using the state action doctrine. By finding sufficient state involvement in the actions of private parties, the Court attributes those actions to the state, and thereby avoids the need to weigh the privacy, associational or free speech rights of some individuals against the speech or equality rights of others. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973); Reitman v. Mulkey, 378 U.S. 369 (1967); Bell v. Maryland, 378 U.S. 226, 255–60 (1964) (Douglas, J., concurring); Robinson v. Florida, 378 U.S. 153 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). *But see* Bell v. Maryland, 378 U.S. at 312–15 (Goldberg, J., concurring) (favoring equality over associational rights after explicitly weighing the two).

In these cases and in those in which no state action claim was involved, *see, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the results have favored the value of equality. Even though the Court upheld private discrimination by finding no state action in Moose Lodge No. 107 v. Irvis, 401 U.S. 163 (1972), the alleged privacy and associational rights of the club members did not prevail in the face of a state public accommodations statute outlawing discriminatory practices. Commonwealth Human Relations Comm'n v. Loyal Order of Moose Lodge 107, 448 Pa. 451, 294 A.2d 594, *appeal dismissed*, 409 U.S. 1052 (1972).

[128] Laurence Tribe has argued that government "abridgments" of expression fall into two categories and that the Supreme Court has developed a distinct method of analysis for each.

> *First*, government can aim at ideas or information, in the sense of singling out actions for government control or penalty, either (a) because of the specific viewpoint such actions express or (b) because of the effects produced by awareness of the information such actions impart . . . . *Second*,

Here the government interests are extremely weighty. The same Constitution which, it has been argued, insures an economically equitable right of family choice in schooling also forbids stigmatization and the denial of rights and benefits on the basis of race. The thirteenth, fourteenth and fifteenth amendments express the constitutional commitment that whatever choices individuals, families or groups may be entitled to make, they are not entitled to inflict racist conditions upon others. Certainly the preservation of racism is not among the rights secured by the first amendment. Moreover, government restriction of racist speech would be far from total, as private citizens would still be free to express racist ideas outside of the schools.

Finally, while the Court has generally condemned discrimination among ideas as forbidden censorship,[129] it has also valued some speech more highly than other speech and therefore protected it more scrupulously.[130] Thus, while libel, pornography and commercial

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> without aiming at ideas or information in either of the above senses, government can restrict the flow of information and ideas while pursuing other goals, either (a) by limiting an activity through which information and ideas might be conveyed or (b) enforcing rules compliance with which might discourage the communication of ideas or information.

L. TRIBE, *supra* note 1, at 580.

[129] *See* Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 99 (1972) (ordinance may not distinguish between peaceful labor picketing and other peaceful picketing).

[130] *See* Roth v. United States, 354 U.S. 476, 485 (1957) (holding "obscenity" unprotected by the first amendment); Beauharnais v. Illinois, 343 U.S. 250, 256–57 (1952) (denying protection to "libellous . . . utterances"); Valentine v. Christensen, 316 U.S. 52, 54 (1942) (refusing to enjoin suppression of "commercial" speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding "fighting words" unprotected).

In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the Court upheld a zoning ordinance regulating the location of theatres displaying sexually explicit "adult" movies. In so doing, Justice Stevens' plurality opinion admitted that the ordinance regulated nonobscene speech that was protected by the first amendment, but found justification for this content-based regulation by arguing in part that sexually explicit expression has "lesser" value than other protected speech and thus does not demand full government neutrality. "[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ." 427 U.S. at 70. Justice Stevens also stated that "[e]ven though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these

speech are not excluded from the first amendment's protection, their regulation appears to be more easily justified than that of speech that is more highly valued. The commitment to racial equality articulated in the thirteenth and fourteenth amendments necessarily implies that racist speech is of little value to the political system that the first amendment seeks to protect. Like pornography and libel, it should be given less weight when placed in the balance against competing societal interests.[131] When all these factors are considered, there seems little doubt that the balance should swing in the direction of the government's protection of equality.

C. Where Education, Liberty and Racial Equality are not in Conflict

The second broad category of school reforms that might vindicate first amendment rights calls for reducing the imposition of values within schools rather than increasing choice among schools. Here, the target becomes any mechanism that aids the powerful in imposing beliefs, attitudes or ideologies upon the powerless.

These reforms assume that most children will continue to go to public schools. They are based on the premise that even incomplete remedies that move in the direction of increasing respect for first amendment freedom of consciousness are important. Although these partial remedies may not provide the comprehensive protection for minority values that equal choice of schooling promises, they do have the benefit of advancing racial equality along with parental liberty. This is so because the failure to respect the culture and values of the minority student will lead to consequences that are condemned by both the first amendment and the fourteenth amendment. Racism and the repression of parental liberty are two sides of the same coin to many

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materials as the basis for placing them in a different classification from other motion pictures." *Id.* at 70–71. By this rationale, racist speech could be accorded less protection then nonracist utterances, *see* note 131 *infra*, especially in the context of a state-subsidized school, *see* note 127 *supra*.

[131] It might well be argued that the devaluation of speech advocating white supremacy is more easily justifiable than the Court's questionable treatment of sexually explicit speech in Young v. American Mini Theatres, Inc., 427 U.S. 50, which finds no textual support in the Constitution.

families; and minority families are a disproportionate share of the victims of the imposition of consciousness in government schools.

Three possible remedies aimed at the mechanisms of imposing belief within schools are: 1) the abolition of standardized testing, 2) the creation of decentralized community control of schools and 3) the retraining of teachers concerning the imposition of values.

1. Abolition of Standardized Testing

The discussion in Part III made clear the need to abolish standardized testing as a means for determining access to knowledge and power. Just as there is no such thing as a value-neutral education, there is no such thing as a value-neutral test.[132] Forward-looking educational psychologists have already begun to devise nonstandardized methods of evaluation, diagnosis and prognosis that will provide educators with the information they need to determine how best to teach their students.[133] Job-related measures of performance should replace tests like the NTE. When classification devices are laden with values unrelated to one's ability to acquire knowledge or perform the job in question, they impinge upon rights protected by the first amendment and should be abandoned.

2. Community Control of Schools

The community control movement saw its peak in the late sixties. Black parents realized that a school was not likely to be responsive to their wishes nor to serve the needs of their children unless they had a voice in its hiring, firing and educational policy.

The struggle by minority communities for control of the schools was certainly important as a first step toward a more generalized shift in the power relationships of the ghetto. But perhaps a more significant aspect of control of education was the concomitant control of the vehicle that transmits ideas and values, so that instead children may view the world from their own perspective.[134]

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[132] Cattell, *Are Culture Fair Intelligence Tests Possible and Necessary?* 12 J. RESEARCH DEV. EDUC. 3, 6, 11 (Winter 1979).

[133] *See, e.g.*, Hilliard, *supra* note 81.

[134] Of course, community control would not satisfy those parents who would be a racial, ethnic or ideological minority within their own community. If a majority in a

If people who are otherwise excluded from the political process are allowed to determine what and how their children will be taught, they will regain control of an ingredient necessary to effective participation in the political process. In other words, they will take an important step toward recapturing their first amendment rights.

Supporters of proposals to remove the schools from the public sector have argued that their proposals will result in greater parental influence over the schools their children attend.[135] But in any school system those who control the school will promote values and ideals that best serve their own interests. As long as schools are controlled by the groups that presently command substantial financial resources and political muscle, they will continue to reflect the interests of those limited groups. Meaningful choice among schools will exist only when the diversification of control is maximized: parental choice requires parental control.

Community control of schools for those who have been excluded from the political process must involve a conscious and vigorous effort to destroy barriers to their involvement. Those who profess to advance such a goal must be willing to insure that these barriers are eliminated and that advances in the transfer of control are protected in reality as well as in theory.

3. Reeducating the Educators

Most educators, while professing neutrality, impose their values upon their students in an almost self-righteous fashion. This is because most fail to recognize that they are transmitting beliefs and self-interested values rather than objective truths.

The teacher who has been taught a Eurocentric version of history has no reason to believe that his imposition of that history upon a black child is tantamount to belief coercion. This means that a necessary first step toward the preservation of first amendment freedoms must involve the reeducation of educators to help them recognize their own values

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racially mixed community put its version of a "good education" into the curriculum, and excluded minority views, the members of the minority might be prompted to move to a neighborhood where they would be the majority, thereby creating more segregated neighborhoods.

[135] *See* Coons & Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CALIF. L. REV. 321, 336 (1971).

and realize how, naturally, even unconsciously they relay those values when teaching. Moreover, it is not enough that teachers confront their own deeply embedded values; they must also (and perhaps more significantly) be sensitized to the values of the particular racial and socioeconomic communities that entrust to them the education of their young. A teacher who is well aware of his own values and teaches them as possible alternatives is far preferable to a teacher who considers his values as objective truth. The success of such reeducation of educators depends upon their accepting diversity of values as a valid expression of individuality, as a necessity for the health of the political process and as something the first amendment was designed to protect.[136]

D. Legal Solutions, Political Realities

It is important to think politically as well as constitutionally about the significance of remedies for school socialization. While reforms in

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[136] Freire has proposed an alternative for the revolutionary educator. If educators are willing to enter into a "dialogical encounter" with those they seek to educate, "to respect the view of the world held by the people," to reflect their aspirations, to expose society's contradictions and present them with challenges which require them to respond, the people will perceive that education is vitalizing rather then destructive and will therefore learn. P. FREIRE, *supra* note 2, at 83.

However, even a system of education that fosters tolerance might expose some school children to values their own parents might reject. For example, many parents believe that their values are objectively true (e.g., ordained by God or history), and they would object if their children were taught that values are relative and a matter of personal choice. Some parents even object to the democratic values of tolerance, free expression and diversity; these parents would certainly object if their children were taught beliefs antithetical to their own. The parents' right to such beliefs is of course protected by the very first amendment they reject. *See, e.g.*, Collins v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); National Socialist White People's Party v. Pingers, 473 F.2d 1010 (4th Cir. 1973); Village of Skokie v. National Socialist Party, 69 Ill. 2d 605, 373 N.E.2d 21 (1978) (per curiam). If parents have a first amendment right to determine what values their children are taught, then the rights of intolerant parents are denied by teaching their children tolerance. Even well-meaning efforts to give equal time to differing views would not dispose of the dilemma. But at least more tolerant teacher attitudes in the public schools would infringe the rights of fewer people and infringe them less severely than would intolerant propagation of any narrower official doctrine.

the areas of testing, parental participation and teacher attitudes within the public schools do not bring conflicting constitutional values into play, they are likely to encounter strong political resistance. The testing industry has strong economic interests at stake that it will not easily relinquish.[137] Nor will those who are advantaged by present test bias be eager to give up that privilege. As noted earlier, the Supreme Court has turned a deaf ear to constitutional attacks on standardized tests based on the equal protection clause.[138] It is unlikely that the Court will be more sympathetic to challenges based on a less well-established first amendment theory.

The massive resistance of professional educators to the participation of poor and minority parents in school governance was documented during the struggle for community control in the New York City schools.[139] There is little reason to believe there has been substantial change in the self-interested politics of predominantly white teachers' unions located in predominantly nonwhite school districts. It is equally unlikely that a series of sensitivity training sessions will significantly change the attitudes of these teachers towards their students.

Given the experience of minority communities in their struggles to eradicate racism within the public school system, it should not be surprising that one encounters skepticism about the ability of existing constitutional and statutory provisions to resist the racism that may well accompany innovations designed to maximize school choice. The courts have proven an uncertain ally in the struggle to make reality of the promise of the Civil War amendments, and minorities have learned that combatting racism in schooling involves more than the existence of formal legal protections. Instead, what minority parents see is that inner-city schools have become increasingly segregated because white

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[137] The "nonprofit" Educational Testing Service, which administers the NTE, has an annual income of more than $80 million. *See generally* Fallows, *The Test and the Brightest: How Fair are the College Boards?* ATLANTIC MONTHLY, Feb. 1980, at 37–48; Kiersh, *Testing is the Name, Power is the Game,* The Village Voice, Jan. 15, 1979, at 1.

[138] *See, e.g.,* United States v. South Carolina, 434 U.S. 1026 (1978); Washington v. Davis, 426 U.S. 229 (1976).

[139] M. BERUBE & M. GITTEL, CONFRONTATION AT OCEAN HILL–BROWNSVILLE (1969); M. FANTINI, M. GITTEL & R. MAGAT, COMMUNITY CONTROL AND THE URBAN SCHOOL (1970); D. RAVITCH, THE GREAT SCHOOL WARS (1974).

parents can afford to take their children to the suburbs or send them to private schools. It is hardly surprising that they are opposed to making white flight more affordable. Advocates of proposals supporting school choice have argued: 1) that segregated schools are illegal and will remain so, 2) that privately run schools cannot be much more segregated than the present publicly run ones, 3) that black parents will now have the resources to follow the white parents in their flight from the public schools and 4) that safeguards and incentives will be built into the new legislation to insure that segregation in our schools will not increase.

But the Supreme Court's reaffirmation of the applicability of *Brown v. Board of Education* to private schools notwithstanding,[140] the Court has been increasingly reluctant to apply provisions of the fourteenth amendment to even the most heavily regulated private institutions.[141] It is similarly easier to persuade legislatures and public administrators to take responsibility for the actions of public entities rather than private ones. The only appropriate response to the argument that "things can't get much worse" is: "they can." Furthermore, once segregation is cloaked in the honorific rhetoric of first amendment freedom the damage that is done will be even harder to rectify.

Minorities and the poor are extremely skeptical of those economic theories that tell them that given an equal number of dollars they will have equal purchasing power and thereby have access to the same or equivalent educational opportunities. The same dollars buy them poorer food and housing. Why should it be any different with education? Blacks have had even less success in influencing the values and actions of landlords, merchants and lenders in their neighborhoods than they have had with the public schools.[142]

Finally, while the authors of various free choice proposals promise that special attention will be given to measures to guard against

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[140] Runyon v. McCrary, 427 U.S. 160 (1976).

[141] *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (warehouser under contract to the state); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (utility company); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holder of state-issued liquor license).

[142] D. CAPLOVITZ, THE POOR PAY MORE 12–31, 94–104 (1967); M. HARRINGTON, THE OTHER AMERICA 139–57 (1962).

further segregation of our schools,[143] blacks have little confidence that such measures will survive a political climate dominated by proposals to balance the budget, suits claiming "reverse discrimination," and legislation designed to prohibit busing to achieve racial balance.

The suggestion that we remove the schools from government control has come at just the point when blacks and other minorities are gaining control of government at the local level where most school decisions are made. They are being asked to abandon majoritarian processes when they have finally become a significant and effective political majority in many localities. The forces that have kept minorities from acting in their own self-interest where they are a majority are not likely to disappear once schools are isolated from the democratic process. On the contrary, it is probable that once isolated from that process those forces will become even more firmly entrenched.

In the final analysis it would appear that where racial minorities and the poor are concerned the question is not so much how to protect the minority from the imposition of majority values as how to protect those who are relatively powerless from having the values of the powerful imposed upon them. If school financing that provides maximum choice can do no more than provide minorities a choice among schools controlled by those persons who presently control the private sector, there is little more than the opportunity to leap from the frying pan into the fire. And if majority opposition to ending standardized testing, establishing community control, and reeducating teachers continues, the absence of family choice in schooling will perpetuate both racism and the manipulation of consciousness.

One is tempted to conclude, therefore, that while the legal protections against racism in schools could be sufficient to insure that increased parental liberty would not mean increased racial discrimination, legal protection and political reality are not necessarily the same. The first amendment is massively abused by the present structure and ideology of schooling. Changes enhancing family choice and taming the forces of conformity in schooling are needed. It is politics which will determine whether these changes are achieved for the equal benefit of all families or simply as instruments for perpetuating the status quo in a new form.

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[143] *See* J. COONS & S. SUGARMAN, *supra* note 97; C. JENCKS, *supra* note 98.

V. CONCLUSION

Throughout this essay we have examined a variety of ways in which the ideology and structure of schooling infringe upon first amendment rights and undercut the political process. Through first amendment analysis we have tried to add another dimension to the traditional understanding of how poor, working-class and minority families are victimized by their lack of power over schooling decisions. Although "practical" people may find it disconcerting, we have pointed to a problem without offering a solution.

At bottom we conceive this problem as an issue of power—how is the power to use the schools' inevitable value-inculcation process distributed among those for whom access to the political process is at stake? Whether the power of involuntary school socialization is held by the political majority, a governmental entity, an interest group or a private organization intimately involved with the business of education, the damage to the individual's freedom of expression is the same, and the threat to the health of the first amendment and the political system is as great. We have offered a broad interpretation of the modern meaning of the first amendment and value inculcation in schooling that requires a broad understanding of how the inequitable allocation of power over education distorts the system of freedom of expression.

We suspect that those who focus solely upon the separation of school and state that might be accomplished through a voucher system will find that they have failed to address powerful forces that will continue to deprive parents of control over value inculcation in schools.[144] Standardized testing in admission and promotion decisions as well as lack of understanding of discipline problems may render family choice among schools a mere illusion.

We suspect also that those who, in the name of opening up the system of freedom of expression and the political process, advocate changes in schools such as the elimination of standardized testing or the reform of conformist teaching will eventually discover that their goals are thwarted by an absence of equal family choice among schools. In matters as personal as the formation of conscience there

[144] *See* the discussion of the proposed revision of school financing in California, *supra* note 98.

will always be dissenters; and if the first amendment has any meaning it is that dissenters may not be subjected to majority coercion no matter how enlightened the values of the majority may become.

If this essay contributes to an understanding of the ways that schools damage the political process, and increases skepticism about school reforms that do not take account of value inculcation, it may be regarded as useful. If this essay contributes to an increased public discussion of the first amendment and schooling it will have satisfied its authors' best intentions.